## Cecil Walker Machinery Co. and Romie Ray Eden. Case 9-CA-15242

# August 3, 1981

## **DECISION AND ORDER**

On April 9, 1981, Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein.

The Administrative Law Judge credited employee Romie Ray Eden's testimony that Parts Manager Coffman told him he was being transferred because, "I heard what you said at the union meeting and I can't have you running around talking about your problem." The Administrative Law Judge did not consider, however, whether Coffman's statement violated Section 8(a)(1) of the National Labor Relations Act. We find that Coffman's statement constitutes a threat to discipline an employee because of the employee's union activities and, thus, violates Section 8(a)(1) of the Act, as alleged in the complaint. Accordingly, we shall issue our customary order to remedy this violation.

# AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 4 and 5:

- "4. By threatening Romie Ray Eden with discharge and/or discipline because of his sympathy for or activities on behalf of the International Union of Operating Engineers, Local 132C, AFL-CIO, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
- "5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act."

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cecil Walker Machinery Co., Charleston, West Virginia, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Threatening employees with discharge and/or discipline because of their sympathies for or activities on behalf of the International Union of Operating Engineers, Local 132C, AFL-CIO.
- (b) Discouraging membership in or activities on behalf of the above-named Union, or any other labor organization, by transferring employees to other jobs at a reduction in total wages.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
- 2. Take the following affirmative action designed to effectuate the purposes of the Act:
- (a) Offer to Romie Ray Eden, if it has not already done so, immediate and full reinstatement<sup>3</sup> to his former job as truckdriver on the Wayne County run or, if it no longer exists, to a substantially equivalent one, without prejudice to the seniority and other rights and privileges previously enjoyed by him, and make him whole for any loss of pay or benefit, with interest thereon,<sup>4</sup> he may have suffered by reason of Respondent's discrimination against him.
- (b) Post at its Charleston, West Virginia, offices and facilities copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

<sup>&</sup>lt;sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products. Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>&</sup>lt;sup>2</sup> Respondent has excepted to the Administrative Law Judge's failure to defer to an arbitrator's award which, according to Respondent, resolved the underlying dispute. The arbitration decision, however, concerned only Eden's 3-day suspension preceding his transfer, and that suspension is not in issue herein. Secondly, Eden's grievance about his transfer was not pursued to arbitration by the Union. Accordingly, we find no substance in Respondent's contention.

<sup>&</sup>lt;sup>3</sup> Contrary to the Administrative Law Judge, we find it necessary to order Respondent to offer reinstatement to Eden. While the record reflects that Respondent returned Eden to his job as a truckdriver on September 2, 1980, it does not reveal whether Eden was offered reinstatement to the Wayne County run. This is a matter best left to the compliance stage of this proceeding.

<sup>&</sup>lt;sup>4</sup> Member Jenkins would compute the interest due on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

<sup>&</sup>lt;sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

## **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with discharge and/or discipline because of their sympathies for or activities on behalf of the International Union of Operating Engineers, Local 132C, AFL-CIO, or any other Union.

WE WILL NOT discourage membership in or activities on behalf of the above-named Union, or any other labor organization, by transferring employees to other jobs at a reduction in total wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer to Romie Ray Eden immediate and full reinstatement to his former job as truckdriver on the Wayne County run or, if it no longer exists, to a substantially equivalent one, without prejudice to the seniority and other rights and privileges previously enjoyed by him, and make him whole for any loss of pay or benefit, with interest thereon, he may have suffered by reason of our discrimination against him.

## CECIL WALKER MACHINERY CO.

## **DECISION**

## STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: This case was heard at Charleston, West Virginia, on February 3, 1981, pursuant to a charge filed April 28, 1980, by Romie Ray Eden and a complaint which was issued June 12, 1980. A timely answer was filed on June 23, 1980. The questions presented are whether the Respondent, Cecil Walker Machinery Co., (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act),

by threatening an employee with discharge and/or discipline because of said employee's sympathies for or activities on behalf of the Union, and (2) violated Section 8(a)(1) and (3) of the Act by transferring its employee Romie Ray Eden to a warehouse position at a reduction in total wages.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and for Respondent, I hereby make the following:

#### FINDINGS OF FACT

## 1. JURISDICTION

Respondent, a West Virginia corporation, maintains an office and place of business in Charleston. It is engaged in the manufacture and sale of mining equipment. During the 12 months preceding the issuance of the complaint, a representative period, Respondent purchased and received at its Charleston facility products, goods, and materials valued in excess of \$50,000 from other enterprises located within the State of West Virginia, each of which received those products, goods and materials directly from points outside the State of West Virginia.

Respondent admits and I find (a) that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and (b) that the Union, the International Union of Operating Engineers, Local 132C, AFL-CIO, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

The Charging Party, Romie Ray Eden, commenced working at Respondent's Charleston facility almost 4 years before the hearing herein. He began in the warehouse filling orders and getting parts ready for shipment. Approximately 1 year after he started, Eden began driving a truck delivering heavy equipment to strip mines and construction sites.<sup>3</sup> He was given what is called the Logan County run, a route that went from Charleston to Oceana, Welsh, Williamson, Matewan, and back to Charleston. For 2 years he served Respondent's customers along this route. In November or December 1979 Respondent's parts manager, Earl Coffman, asked Eden if he wanted to take over the Wayne County run since Eden had more seniority than the driver on that run and the Logan County run was about to be transferred to

<sup>&</sup>lt;sup>1</sup> All dates are in 1980 unless otherwise specified.

<sup>&</sup>lt;sup>2</sup> Counsel for the General Counsel's unopposed motion, dated February 19, 1981, to correct the transcript is granted and received in evidence as G.C. Exh. 2.

<sup>&</sup>lt;sup>3</sup> Eden's hourly rate of pay did not change when he started driving a truck. Under the agreement between Respondent and the Union, Eden was still classified as a warehouseman; the agreement did not have a separate classification for a truckdriver. Truckdriving, however, was viewed by Eden as a better job since he was able to put in about 4 hours of over-time each working day whereas in the warehouse he was only able to put in between 7 and 10 overtime hours every 3 weeks.

<sup>&</sup>lt;sup>4</sup> All of Respondent's personnel referred to herein work at its Charleston facility.

Respondent's newly built Logan store. Eden accepted and Coffman told him on or about February 1 that the job was his after he trained a driver for the Logan County run and he himself was trained for the Wayne County run.

After returning from his Logan County run on the night of February 5, Eden and Respondent's evening shift foreman, Steve Cavender, had an extended discussion about the truck Eden was to operate on the Logan County run the following day. The truck had "bald" tires and it was not safe to operate over some of the rough terrain in Logan County in the middle of the winter. Eden advised Cavender that he would not operate the vehicle. He was told by Cavender that he would be looking for a job if he refused. Cavender was then told by Eden that if he had to look for another job he would be looking for the foreman. That same night Eden was suspended for 3 days (February 6, 7, and 8) by Coffman. Eden drafted a grievance and spoke with a union steward, Mike Smith, before leaving work.

Pursuant to the grievance procedure set forth in the agreement between Respondent and the Union, Eden participated, with certain of Respondent's supervisors, in the first step on February 6, from 6 a.m. until 5:30 p.m. Upon his return to work on Monday, February 11, Eden drafted a written statement of what occurred and gave it to Smith. Eden then began to train another driver for the Logan County run. He did this through Friday, February 15.

On Saturday, February 16, Eden, along with about 50 other employees of Respondent, attended a union meeting. All were union members, and the purpose of the meeting was to review proposals regarding the matters which might be included in negotiations with Respondent over the upcoming contract. When safety was discussed, Eden spoke out explaining that he had been suspended for refusing to drive an unsafe vehicle. He urged that the new contract contain a clause covering similar situations.

Eden began training on the Wayne County run on Monday, February 18. The following day Respondent's day-shift foreman, Arthur White, after asking Eden if he now knew the Wayne County run, advised him that he would be trained for 1 more day and then he would take over the route himself on Thursday, February 21.

## B. The Transfer

However, on Wednesday night, February 20, White told Eden that he was being taken off the truck and would be placed in the warehouse. When Eden asked why, he was told he would have to speak to Coffman about it. Coffman, speaking to Eden alone, advised him that he was being taken off the truck because "you have a bad attitude . . . I heard what you said at the union meeting and I can't have you running around talking to everyone about your problem." 6 Eden explained to Coff-

man that the only people present at the union meeting were Respondent's employees who were union members, and that he had not spoken disparagingly of Respondent to Respondent's customers. Eden then asked Coffman to contact Respondent's customers to verify this.

On Sunday, February 24, there was another meeting of union members to finalize the matters discussed on February 16.7

Some of the witnesses testified that they noticed a change in Eden's attitude towards management after he was suspended. None, however, testified that his attitude actually affected his work. And none testified that they were aware of any of Respondent's customers complaining about Eden or that Eden was in fact "bad mouthing" the Company. Respondent's assistant parts manager, Steve Golf, testified that at a general supervisors' meeting on February 20 he suggested that Eden be removed from the truck:

... because I felt like, as upset as he was, I was worried about his performance, and I was also worried about the relationship that Walker Machinery might have with its customers, since he was at that time, his job assignment at that time, was a customer contact job. 10

Golf testified that he was not aware on February 20 of any "anti-company statements that Mr. Eden may have made in a union meeting," and that no such statements were discussed at the February 20 supervisors' meeting. The final decision to transfer Eden was assertedly Coffman's. As here pertinent, Coffman is at the top of the managerial hierarchy, with Golf next, followed by White and Cavender.

White, Eden's immediate supervisor, testified that he agreed with the recommendation of the assistant parts manager and that he was not aware when he participated in the supervisors' meeting on February 20 of any derogatory statements Eden may have made against Respondent at a union meeting. Assertedly, no statements were discussed at the supervisors' meeting. On cross-examination White testified that during the 2 or 3 days preceding the February 20 supervisors' meeting he had "sort

<sup>&</sup>lt;sup>5</sup> Initially Eden was advised that he was suspended for refusing to operate the vehicle. Later, the reason was changed to what Eden said to Cavender.

<sup>6</sup> This version of the discussion is Eden's, which I credit. Coffman testified that he did not, at least at this meeting, say anything about what

Eden said at the union meeting because, he asserted, he did not know it at that time.

<sup>&</sup>lt;sup>7</sup> Eden testified that he thought that the meeting on February 24 was to consider Respondent's proposals. This mistake does not impair Eden's credibility.

Smith testified that Eden began to act irrationally. In support of this, Smith cited one instance when Eden indicated that he would leave a meeting with company representatives allegedly without cause. Also, Smith, without giving specifics, referred to some telephone conversations he had with Eden.

<sup>&</sup>quot;According to the February 11-15 trainee on the Logan County run, when Eden was asked where he was on February 6, 7, and 8, he responded that he was suspended. Apparently, the Logan County run was not made while Eden was suspended since the customers had to go to the Logan store to pick up parts.

<sup>&</sup>lt;sup>10</sup> Golf's opportunity to observe Eden was limited to, at most, four occasions between February 11 and February 20 when Golf was still at the warehouse when Eden returned from his route. It is the testimony of Golf that during this period he attempted to converse with Eden four or five times.

of discussions about placing Eden back in the warehouse.  $^{11}$ 

Prior to February 20 Coffman saw Eden about once a week in the afternoon since Eden was gone in the morning by the time Coffman arrived at work. At the time of the supervisors' meeting on February 20, Coffman allegedly was not aware of any statements that Eden may have made in a union meeting, and Coffman testified that Eden's union activity was not involved in any way in the decision to move Eden back to the warehouse. Coffman attended Eden's all-day first-step grievance procedure. He also testified that this is the only grievance that Respondent had in the parts department since he became parts manager in February 1979. On or about Monday, February 25, Eden asked Coffman when he could drive a truck again. Coffman testified that at this meeting he told Eden that he would not be put on the road because of his poor attitude, and that he heard that Eden was raising "hell" at the union hall. 12

On cross-examination, Coffman testified that at no time before Eden was taken off the truck did Eden refuse to communicate with Coffman; that he had never heard that Eden had refused to communicate with supervisors, interfering with his job; that no specific instances of such conduct were discussed at the supervisors' February 20 meeting; that normally he leaves work at 5 p.m., White leaves at 4 p.m., and Golf leaves at 5 p.m.; that Eden generally left on the run at 6 or 6:30 a.m.; that Eden generally returned to Respondent's Charleston store after 5:30 or 6 p.m.; and that, during his conversation with Eden on or about February 25, Coffman advised Eden that, if Eden wanted to transfer to Logan, Eden could have the Logan County truck run back. 13

In the warehouse, Eden's hours were 8 a.m. to 4:30 p.m. with overtime available as described in footnote 3, supra. He worked this schedule until September 2 when he was put back on a truck. 14 Two weeks before he was put back on the truck, on August 19, an arbitration hearing was held on Eden's grievance. In his opinion and award, dated October 20, 1980, the arbitrator concluded that the imposition of the 3-day suspension was not unreasonably severe and the determination of management must be sustained. 15

#### III. DISCUSSION AND CONCLUSIONS

I find that the evidence of record supports the General Counsel's allegation that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Respondent, on the one hand, contends that Eden was taken off the truck and placed back in the warehouse because management was concerned that Eden's attitude would have an adverse effect on customer relations. The General Counsel, on the other hand, contends that Eden was taken off the truck because of his union activity. The record supports the General Counsel for:

- There is no indication that Eden spoke disparagingly about Respondent to any of Respondent's customers.
  - 2. There were no customer complaints about Eden.
- 3. Respondent made no attempt to ascertain whether Eden was disparaging it to its customers, which could have been accomplished—if Respondent is concerned about calling its customers in this type of a situation—simply by asking the Logan County run driver on February 18, 19, or 20 whether management's alleged fears were well founded based on Eden's conduct during the week of February 11-15.
- 4. The timing of the transfer in that Eden was not taken off the truck during the week of February 11-15 but rather only after he spoke out at a union meeting.
- 5. White was satisfied with Eden prior to the transfer, for on February 19 he told Eden that he would begin handling the Wayne County run alone on February 21.
- 6. Neither of Eden's immediate supervisors, White and Cavender, suggested that Eden be placed in the warehouse but rather it was Coffman's assistant who made the suggestion.
- 7. If there was an attitudinal problem with Eden, the witnesses who testified on this point indicated that it did not affect his work.
- 8. Testimony about Eden's allegedly poor attitude subsequent to his suspension is vague and general at best. Coffman was not in a position to properly evaluate Eden's attitude between February 11 and February 20. Golf's testimony is not specific. And there is a conflict regarding the testimony of White. 16 On the one hand, White did not deny that on February 19 he told Eden that Eden would solo on the Wayne County run as of February 21. On the other hand, White testified that during the 2 or 3 days preceding the February 20 supervisors' meeting he had "sort of" discussions about placing Eden back in the warehouse.
- 9. The decision to transfer Eden back to the warehouse was ultimately Coffman's but his alleged justification, namely, that he was concerned that Eden's attitude would have an adverse effect on Respondent's customers, is belied by the fact that about 5 days after he took Eden off a truck he offered to place him back on the truck provided he take the Logan County run which Coffman "thought" had become a nonunion position.

<sup>&</sup>lt;sup>13</sup> This appears to conflict with the individual's indication to Eden on February 19 that as of February 21 Eden would take over the Wayne County run. White did not deny this conversation with Eden.

<sup>&</sup>lt;sup>12</sup> On rebuttal, **Eden testified** that Coffman discussed Eden's comments at the union meeting only on February 20, and this subject was never brought up again by Coffman.

<sup>&</sup>lt;sup>13</sup> Coffman "thought" Respondent's new shop was nonunion.

<sup>&</sup>lt;sup>14</sup> Eden indicated that he may have driven a truck one or two times just before the beginning of September. He filed a separate grievance over being removed from the Wayne County run and being replaced by a driver who had less seniority. The Union determined, however, that under the contract between it and Respondent all parts people were in the same classification and the Union did not believe it had any contractual rights to tell Respondent whether it had to place a person on a truck vis-a-vis in the warehouse.

<sup>&</sup>lt;sup>15</sup> Jt. Exh. 2. At p. 4 of his opinion and award the arbitrator states. During the course of the conversation the grievant told Cavender that he would not drive the truck in question on the Logan run the next day. Cavender told him that he could be looking for a job if he refused to drive the truck the next morning. The grievant responded to the effect that if he lost his job he would meet Cavender outside, or better yet, would meet Cavender inside.

As indicated by counsel for the General Counsel, the opinion and award of the arbitrator is not being challenged herein.

The night-shift foreman did not testify in this proceeding.

10. On the one hand, Eden testified that Coffman said on February 20, and only on February 20, that he was taking Eden off the truck because Eden had a bad attitude, and that Coffman had heard what Eden said at the union meeting, and Coffman could not have Eden running around talking to everyone about what happened. On the other hand, Coffman claims that he did not say this on February 20. Rather, he claims he said it on or about February 25. He testified that he was not sure exactly when he said it during the week of February 25-29; that he was not sure when he heard about what Eden said at the union meeting other than he was told after February 24; and, that he did not remember who told him what Eden said at the union meeting. 17 In the circumstances, I credit Eden's testimony and not Coffman's testimony.

The transfer was not effected for a legitimate reason. Eden was transferred out of the better job in retaliation for his protected union activities in violation of Section 8(a)(1) and (3) of the Act. 18

No evidence was presented regarding any violation of the Act independent of the transfer, and consequently the separate 8(a)(1) alleged violation described in paragraph 5 of the complaint will be dismissed.

Upon the foregoing findings of fact and conclusions based thereon, and upon the record as a whole, I make the following:

### CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By transferring Romie Ray Eden from one job to another on February 20, 1980, because he engaged in protected union activity, Respondent has violated Section 8(a)(1) and (3) of the Act.
- 4. The unfair labor practice set forth above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 5. Respondent has not engaged in any unfair labor practices not specifically found herein.

### THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom. Also, Respondent will post an appropriate notice to employees and make Romie Ray Eden whole for all wages lost as a result of his unlawful transfer on February 20, 1980. Said backpay and interest thereon is to be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977). 19

[Recommended Order omitted from publication.]

This effectively precluded calling whoever told the parts manager and ascertaining exactly when the parts manager was placed on notice.
 N.L.R.B. v. Sencore. Inc., 558 F.2d 433 (8th Cir. 1977), enfg. 223 NLRB 113 (1976).

<sup>&</sup>lt;sup>19</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). As noted above, Eden began driving a truck again on September 2. Consequently, it is unnecessary to require reinstatement of Eden to this position. Obviously, any involuntary transfer of Eden from this position should be made only for a legitimate business purpose.